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October 27, 1998

The Honorable Raymond Olivaria
Amador County Assessor
500 Argonaut Lane
Jackson, CA 95642

Re: Change in Ownership - Transfer to Grandchildren,
Rescission or Miscellaneous Arrangement.

Dear Mr. Olivaria:

This is in response to your August 17, 1998 letter, requesting our opinion concerning the change in ownership consequences and the possible application of the grandparent/grandchild exclusion or other exclusions relevant to the transaction described below. Please accept our apologies for the delay and any inconvenience that may have resulted.

The facts you provided for purposes of our analysis are as follows:

1. On December 22, 1995, grandparents, James and Audrey, transferred by deed certain real property to their grandchildren, Steve and Cynthia.
2. On January 31, 1996, Steve filed a claim for the grandparent/grandchild exclusion to avoid change in ownership and reappraisal. Your office denied the claim, because the exclusion was not in effect until March 26, 1996, when Proposition 193 was adopted by the voters of California.
3. Upon denial of the exclusion, grandparents considered rescinding the 1995 deed and re-transferring the property to the grandchildren at the current date, in order to cure the untimeliness of grandchildren's claim. However, rescission was no longer possible. Subsequently, on September 2, 1997, grandparents executed a new document "re-affirming" the 1995 grant deed of the same property to grandchildren. Grandchildren now propose to file a new grandparent/grandchild claim form.

Your questions are: 1) Should the grandparent/grandchild exclusion be granted relative to the 1997 "re-affirmation;" and 2) If not, are there any alternatives through which the grandchildren might obtain the exclusion.

For the reasons hereinafter explained, the answer to the first question is no - the 1995 deed is presumably a valid transfer of the present beneficial ownership under Rule 462.200 (b), and the 1997 "re-affirmation" does not appear to constitute a "transfer" under Revenue and Taxation Code Section 60. And the answer to the second question is possibly - however, there is no evidence to establish that a miscellaneous arrangement under Rule 462.200 (a) or (c) occurred.

Law and Analysis

1. Should the grandparent/grandchild exclusion be granted pursuant to the 1997 document "re-affirming" the 1995 deed transfer? No.

Revenue and Taxation Code Section 60 defines "change in ownership" as "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."

Section 61, subdivision (f), provides that "Except as otherwise provided in Section 62, change in ownership, as defined in Section 60, includes...

the creation, transfer, or termination of any tenancy-in-common interest, except as provided in subdivision (a) of Section 62 and in Section 63.

Assuming that the grandparents' 1995 deed granted 100% of the interests in the property to the grandchildren, all of the property was subject to change in ownership and reappraisal at that time. Since none of the exclusions in Sections 62 or 63 are relevant to this transfer, the issue for the grandchildren is whether the grandparent/grandchild exclusion, as constitutionally adopted in Proposition 193 and as statutorily included in Section 63.1, subdivisions (a) and (c) would be applicable to prevent reappraisal.

As you previously concluded, this exclusion is not applicable to any transfers prior to the March 27, 1996 operative date of the constitutional enactment. This is confirmed by the statutory language in Section 63.1 (a) which states that a change in ownership shall not include the following transfers for which a claim is timely filed:

"(3)(A) Subject to subparagraph (B), the purchase or transfer of real property described in paragraphs (1) and (2) of subdivision (a) occurring on or after March 27, 1996, between grandparents and their grandchild, if all of the parents of that grandchild ... who qualify as the children of the grandparents, are deceased as of the date of purchase or transfer." (emphasis added)

Recognizing the lack of timeliness after the 1995 deed transfer in their case, the grandparents apparently sought to rescind the deed in order to "undo" that transfer and re-transfer the property to the grandchildren again after the operative date of Proposition 193. Rescission would seem to be the proper legal mechanism for accomplishing this objective. We have previously advised that a simple "rescission" amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination, whereby the parties are relieved of their obligations under it and placed in status quo as before its execution. (Black's Law Dictionary, Vol. II, p 1174.) From the change in ownership standpoint, a rescission relates back to the formation of a deed, and thus, places the parties in the same position they were in before it was executed, with the value of the real property reverting to its previous base year value with appropriate adjustments(s) for inflation. ¹ (See Annotation No. 220.0595, Gembac Letter, January 16, 1985, copy enclosed.)

¹ It is important to note, however, that even if an assessor determines that a rescission occurred and chooses to follow this view, the taxes incurred after the contract or deed has been executed and before it was rescinded remain owing, since they have become owing because of the facts which existed on the applicable lien date(s). No refund(s) thereof should be made.

Unfortunately, grandparents were "no longer able to rescind," and have therefore, attempted alter that 1995 transfer date by filing in 1997, a document that "re-affirms" the previous transfer. In our view, since this "re-affirmation document" is by express implication from the facts described, not a rescission, (grandparents were "no longer able to rescind"), it has no legal effectiveness for purposes of "curing" the untimely 1995 deed transfer.

Based on the pertinent statutes and rules, the filing of a document "re-affirming" an earlier deed transfer does not result in a new transfer date for purposes of filing the grandparent/grandchild exclusion claim. Subdivision (e) of Section 63.1 specifically designates the dates for filing this claim, and all of the limitations periods (except one) begin on the date of the purchase or transfer. Paragraph (3)(B) states: "Paragraph (2) [filing requirements applicable to all parent/child transfers of property that has not been transferred to a third party] shall apply to ... purchases or transfers between grandparents and their grandchildren that occurred on or after March 27, 1996." The significant phrase here is "purchases or transfers ... on or after March 27, 1996." For purposes of determining whether a "purchase or transfer" of real property occurred after that date, (and qualifies under Section 63.1), it is helpful to evaluate the controlling provisions for determining what a change in ownership is and when it occurs under Property Tax Rules 462.200 - 462.260 pursuant to the definition of a change in ownership in Section 60.

In examining a validly executed deed, the assessor is authorized to presume under Property Tax Rule 462.200 (b), that the names, dates, and information shown on a deed are correct and reflect the ownership interests in the property described at that time. If this presumption is not rebutted, then the transfer between the parties is a change in ownership. Likewise, under Rule 462.260 (a), where a transfer is evidenced by a deed, the date of recordation is rebuttably presumed to be the date of the change in ownership. If this presumption is not rebutted, then the date on the deed is the date the change in ownership occurred.

Either or both of these presumptions may be rebutted by substantial evidence from the parties indicating that the information on the deeds was not correct. The type of evidence required by the assessee in order to overcome the presumption is described in paragraphs (1) and (2) of Rule 462.200 (b). There is no indication that any evidence or attempt to rebut the presumptions was made in this case.² Accordingly, your office justifiably relied on the December 22, 1995 deed as a transfer of the present beneficial interest in the property from grandparents to grandchildren, and reappraised it as a change in ownership under Section 60.

Apart from a valid rescission or an effective rebuttal of the deed presumption, the December 1995 date of the change in ownership cannot be "undone" or "invalidated." The act of the grandparents in filing a document on September 2, 1997 "re-affirming" their 1995 deed transfer to the grandchildren does not undo or invalidate the 1995 deed, nor move the date of that transfer forward to the 1997 date. At best, the legal effect of any "re-affirming" document would be simply to perfect title to the existing assessee. Under Rule 462.240 (a), the transfer of bare legal title (assuming the 1997 document transferred record title) to an assessee who already holds the present beneficial ownership in the property, is not a transfer for change in

² There is no evidence indicating that the 1995 deed was invalid, voidable, or void, which would possibly rebut the deed presumption in Property Tax Rule 462.200 (b), that a legal grant of the property did not actually occur under the 1995 deed. To the contrary, the fact that the grandparents "are no longer able to rescind" establishes that the 1995 deed was valid and the property transfer enforceable.

ownership purposes. ³ Thus, even if the 1997 "re-affirmation" was a valid deed transfer (a fact which is not entirely clear), the grandchildren received no additional present beneficial or fee interests in the property in 1997 that had not previously been granted in 1995. The 1997 "re-affirmation" was not a transfer under Section 60.

The language in Section 63.1 quoted above, expressly requires the occurrence of "a transfer of real property" which would constitute a change in ownership. Since the "transfer" from grandparents to grandchildren occurred in 1995, the exclusion would not apply, because the filing of a document that "reaffirmed the 12/21/95 grant of the property," was not a "transfer" for change in ownership purposes.

2. Are any alternative means by which the grandchildren might obtain the exclusion? Possibly; however, there is no evidence available.

Occasionally, the facts in a particular case indicate that a deed transfer is a conveyance of real property for some purpose other than a transfer of the present beneficial interest substantially equivalent to the fee. Such "miscellaneous arrangements are set forth in Rule 462.200 (a), "Security Transactions," and (c), "Holding Agreements." If the grandparents were able to prove that their 1995 grant was a transfer of less than the fee interest in the property (they retained beneficial ownership), then a subsequent deed transferring present beneficial ownership to the grandchildren would constitute the transfer date for purposes of the exclusion. Establishing the existence of such arrangements, however, that the grandparents' intentions in executing the 1995 deed were to grant a lesser estate than that which was represented by the description in your letter, would be the responsibility of the grandparents.

In proving that a grant of real property had limitations or reservations that transferred less than the full legal and beneficial interests in that property and was instead merely a security interest, subdivision (a) of Rule 462.200 provides in pertinent part:

(a) **Security transactions.** There are transactions that may be interpreted to be either a conveyance of the property or a mere security interest therein, depending on the facts. There is a rebuttable presumption under Civil Code Section 1105 and Evidence Code Section 662 that a grant of title to real property is a transfer of a present interest in the real property, including the beneficial use thereof, equal to a fee interest. In overcoming this presumption, consideration may be given to, but not limited to, the following factors:

- (1) The existence of a debt or promise to pay.
- (2) The principal amount to be paid for reconveyance is the same, or substantially the same, as the amount paid for the original deed.
- (3) A great inequality between the value of the property and the price alleged to have been paid.

³ The facts would seem to indicate that the grandchildren already had both beneficial and legal title through the 1995 deed transfer. If so, the 1997 "re-affirming" document transferred absolutely nothing.

- (4) The grantor remaining in possession with the right to reconveyance on payment of the debt; and
- (5) A written agreement between the parties to reconvey the property on payment of the debt.

The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns.

Thus, written documentation from a taxing agency, such as the Franchise Tax Board, or from a bank or financing company, stating that a transfer was considered a financing transaction for its purposes, would create a presumption that the transaction was a nonreappraisable event and that beneficial ownership of the property did not transfer at that time.

Alternatively, subdivision (c) of Rule 462.200 makes it clear that a deed transfer from the owner of property to another person or entity merely holding title to the property pursuant to a holding agreement, (or from the entity holding title back to the owner), is also a miscellaneous arrangement which does not constitute a change in ownership.

(b) **Holding agreements.** A holding agreement is an agreement between an owner of the property, hereafter called a principal, and another entity, usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have no discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.

(1) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.

(2) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal.

This subdivision of the rule was applied specifically to a situation involving a nominee corporation which held title to the property under the type of holding agreement outlined in the quoted language above, in the case of Parkmerced Co. v. City and County of San Francisco (1983) 149 Cal.App.3d 1091. The court held that no change in ownership occurs "upon the transfer of bare legal title without a corresponding transfer of the beneficial use thereof," and that since the nominee corporation and its successor held no more than "bare legal title" to the property, the transfer from the partnership to the nominee and from the nominee and its successor to the partnership was not a change in ownership.

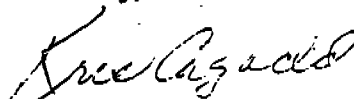
October 27, 1998

Unfortunately, there are no facts submitted which would indicate that the grandparents' 1995 grant of the property to their grandchildren represented either of the foregoing miscellaneous arrangements. Moreover, the fact that a rescission of the 1995 transfer is not possible would seem to indicate that the grandparents' transfer was what it is purported to be, a full grant of the present beneficial ownership of the property.

A taxpayer claiming the benefit of an exception or exclusion from change in ownership has the burden of establishing to the satisfaction of the assessor that he or she qualifies for the benefit. In cases where formal recorded documents, such as deeds, fail to contain complete information which is consistent with the taxpayer's claim, then the assessor is entitled to require that the taxpayer's representations be established by clear and convincing evidence, and a variety of documents to establish that the normal incidents of a "security transaction" or a "holding agreement" were observed.

The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on the present law and facts set forth herein. Therefore, they are not binding on any person or entity.

Sincerely,



Kristine Cazadd
Senior Staff Counsel

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Attachments

cc:

Mr. Richard Johnson, MIC:84
Mr. Rudy Bischof, MIC:64
Mr. David Gau, MIC:64
Ms. Jennifer Willis, MIC:63

RECEIVED
OCT 28 1998
DEPUTY DIRECTOR
PROPERTY TAXES

Rescission

(916) 324-6593

January 16, 1985

J - Transfer of Title
Assessor's Parcel No.

Dear :

This is in reply to Mr. S 's December 13, 1984 letter to Mr. James J. Delaney, Chief Counsel, Board of Equalization regarding the above-captioned matter.

In Mr. S 's letter, he requested that we review the correspondence from Ms. J and advise your office as to whether or not a reversion to the old value is possible. The facts, very briefly restated, are that in December 1983, Ms. J changed the names on the deed of the above-referenced property from herself to her three children. This change was made without the advice of counsel after Ms. J received an unsettling medical diagnosis. In her letter of December 4, 1984, she further indicated that she has continued to live in the house, make all mortgage payments, and the children have continued to live with her. They have not contributed any money toward the mortgage payments.

In her December 4, 1984 letter to your office, Ms. J did not specify if the deed from herself to her three children was given to them or if it was retained in her possession. From her statements, a logical inference would be that the deed was created as a type of estate planning device. This would indicate the donative intent behind such action was testamentary rather than inter vivos in nature.

Section 60 of the Revenue and Taxation Code provides that a change in ownership shall occur upon the "transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the

January 16, 1985

value of the fee interest". In this case, it is quite possible that a present beneficial interest was not transferred from Ms. J to the children and there has been no change in ownership. The standard to be applied would basically consist of whether or not the children received title and were immediately empowered to exercise the full incidents of ownership over the property, i.e., to encumber the property, to lease or rent it and receive rents and profits, to sell the property and receive the proceeds, etc. If the children could not exercise these powers to the exclusion of Ms. J, then you could conclude that a change in ownership between the mother and children did not occur. The determination would, of course, be made by your office based upon the facts. Should such determination be made, Ms. J would be entitled to a refund of all taxes paid as a result of the increase in assessment.

If the deed from Ms. J to her children was a change in ownership, then we are of the opinion that a rescission of the transfer may "relate back" to its formation and dissolve it as though it had never been made. (Long v. Newlin (1956) 144 Cal. App. 2d 509.) Therefore, each party must restore, or offer to restore, to the other all consideration which was received under the contract, upon the condition that the other party do likewise, unless the latter is unable or positively refuses to do so. (Civil Code Section 1691(b).) Upon rescission, the contract becomes a nullity and each of its terms and provisions cease to exist and are not enforceable against the other party. (Holmes v. Steele (1969) 269 Cal. App. 2d 675.)

This would have the result of returning the parties to their original position prior to the reappraisal taking effect. However, it is our opinion that should rescission be resorted to, it can apply only prospectively, and no refund would be available to the parties for the period under which the deed transfer was treated as a change in ownership. This is so since property taxes are determined by the facts as they exist on the lien date. (Doctors General Hospital v. Santa Clara County (1957) 150 Cal. App. 2d 53; Estate of Bakesto (1923) 63 Cal. App. 265; Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157.)

Based on the foregoing, a rescission of the transfer can be effectuated by having the children deed the property back to the mother. Once the deed is rescinded, the parties are then placed in the same position they stood before the deed was executed, since the effect of rescission is to extinguish the deed. No refunds of taxes should be made by the county to

January 16, 1985

the rescinding party while the transfer was in force. Upon rescission, the real property reverts to its previous base year value and should be enrolled at such value as of the date of the rescission. It would, of course, be factored up per the Proposition 13 limitation.

I trust this is responsive to your inquiry; if I may be of further assistance to you, please do not hesitate to contact me.

Very truly yours,

Gilbert T. Gembacz
Tax Counsel

GTG:fr
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